Supreme Court, U.S.
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No. 92-1135

In The

Supreme Court of the United States

October Term, 1992

RICHARD E. GRIFFIN,

Petitioner,

v.

FIRST NATIONAL BANK OF CROSSETT, CROSSETT, ARKANSAS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF ALL PARTIES TO THE PROCEEDING BELOW

1. Richard E. Griffin Petitioner

2. First National Bank of Crossett, Crossett, Arkansas, Respondent. First National Bank of Crossett is wholly owned by Ashley Bancstock Company, a one bank holding company of Crossett, Arkansas.

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FIRST NATIONAL BANK OF CROSSETT,
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Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Arkansas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

Petitioner seeks writ of certiorari to the Arkansas Supreme Court based on an alleged violation of his procedural due process rights. This Court's jurisdiction for certiorari is governed by *Sup. Ct. Rule* 10. Petitioner asserts that his rights to procedural due process were violated because of Special Chief Justice Robert Cearley's participation in this case. That issue was not raised until

two months after the Arkansas Supreme Court decided the case adversely to petitioner.[1]

In the fall of 1991, Arkansas Governor Bill Clinton appointed three special justices, including Special Chief Justice Cearley, to sit in this case to replace three regular justices who had recused.[2] The case was argued orally to the court on April 13, 1992, and was under submission after that date. The opinion was issued on June 29, 1992. By a vote of 5-2, the court reversed and remanded the case to the trial court. Justice Cearley wrote the majority opinion.

Petitioner filed his motion for recusal on August 24, 1992. The Arkansas Supreme Court rules require motions for recusal to be filed a reasonable time before submission of the case.[3] Petitioner did not timely seek recusal. After the Arkansas court issued its opinion, Petitioner states he conducted a "brief but necessary" investigation and learned of a possible connection between Special

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[1] The case was decided on June 29, 1992. Petitioner's Appendix A, page 1a. Petitioner filed for recusal on August 24, 1992. Petitioner's Appendix G, page 54a.

[2] Special Associate Justices Miller and Pinson were appointed on October 4, 1991, and Special Chief Justice Cearley was appointed on December 16, 1991. Respondent's Appendix A, B and C; pages 1a, 3a, and 5a.

[3] Rule 27, *Rules of Arkansas Supreme Court* provides:

> Whenever it is desired to suggest the disqualification of a Judge of this Court in a case to be submitted, the attorney so desiring shall present the matter to the Court in consultation a reasonable time before the day of submission of the case.

Chief Justice Cearley and the Arkansas Bankers Association (the Association). Petitioner waited to file his motion for recusal until after the case had been decided. Had he been successful, he would have done nothing.

Petitioner's motion for recusal was solely based on a self-serving, hearsay affidavit by an employee of his counsel. The motion alleged that Special Chief Justice Cearley should not have participated in this case because he had served as adjunct counsel to the Association, and Justice Cearley and the Association would somehow benefit from the decision. There was no evidence to support Petitioner's motion to recuse other than the affidavit. At most, the affidavit alleges a past relationship between Justice Cearley and the Association, which was not a party to the litigation. The affidavit does not establish that Justice Cearley, or the Association, would receive a substantial, personal, direct and pecuniary benefit from the decision. Any benefit to either Justice Cearley or the Association is based on sheer speculation and conjecture.

The writ of certiorari should be denied because (1) Justice Cearley did not receive a direct, personal, substantial and pecuniary benefit from the decision; (2) Justice Cearley's vote was not crucial in the 5-2 vote to reverse and remand; and (3) the motion to recuse was not timely filed.

PROCEDURAL HISTORY

Petitioner, a practicing attorney for over 25 years, is the Chairman of the Board of First State Bank of Crossett,

Arkansas. Respondent is the other bank in Crossett. Petitioner induced Respondent to lend Bearhouse, Inc. $490,000.00 on May 1, 1986. Petitioner owned a 25% interest in Bearhouse and guaranteed 25% of the Bearhouse loan. A few months after Respondent made the loan, Bearhouse closed and was placed in an involuntary bankruptcy. Bearhouse defaulted on the loan, and Petitioner refused to honor his obligation under the guaranty. Respondent sued Petitioner on the guaranty. Respondent has attempted for over five years to recover the full amount that Petitioner owes, and for more than five years, Petitioner has successfully evaded his obligation under the guaranty. With the filing of this petition, *the odyssey continues.*

On August 20, 1990, the Circuit Court of Ashley County, Arkansas entered judgment in favor of Respondent against Petitioner for $17,000.00. Respondent timely perfected an appeal to the Arkansas Supreme Court, where the case was docketed on March 19, 1991. After the three special justices were appointed, the parties argued the case orally to the Arkansas Supreme Court on April 13, 1992.[4] The case was under submission to the court until its decision on June 29, 1992.

On July 16, 1992, Petitioner filed a petition for rehearing, which was denied. In that petition, Petitioner did not question the propriety of Special Chief Justice Cearley serving on the court. On August 24, 1992, Petitioner filed

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[4] Petitioner erroneously states at page 9 of his brief that the case was orally argued on April 13, 1991.

his motion for recusal. In support of his motion, Petitioner attached only an affidavit of Allen Carney,[5] an employee of Hopkins & James, counsel for Petitioner. Carney stated that he placed two telephone calls to the Association and talked to an unidentified source who told him that Special Chief Justice Cearley acted as "adjunct counsel."[6] Carney also stated that a second unidentified person confirmed that Respondent was a member of the Association.

On September 28, 1992, the Arkansas Supreme Court denied Petitioner's motion for recusal. On that same date, the clerk of court issued a Mandate[7] remanding the case to the Ashley Circuit Court. The case is now pending in the trial court. Petitioner then filed a motion to recall the Mandate, which was also denied.[8]

After the case was reversed and remanded to the trial court, Petitioner again filed a motion in the Arkansas Supreme Court requesting all members of the court to recuse and to vacate its prior decision. That motion was filed in the Arkansas Supreme Court in spite of the fact that the case had been remanded to the trial court and

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[5] Carney's affidavit appears at page 70a of Petitioner's appendices.

[6] It is not clear from the affidavit what is meant by "adjunct counsel" nor the time frame in which Special Chief Justice Cearley had supposedly acted as adjunct counsel to the Association.

[7] The Mandate was issued on September 28, 1992 and filed with the Ashley Circuit Court on September 29, 1992. A copy of the Mandate appears at page 23a of Petitioner's appendices.

[8] See Petitioner's Appendix C, page 23a.

was no longer pending before the Arkansas Supreme Court. That motion was denied on November 4, 1992.[9]

ARGUMENT

1. Justice Cearley Did Not Receive A Direct, Personal, Substantial and Pecuniary Benefit From The Decision.

This Court has held that in only the most extreme cases of bias and prejudice is disqualification of a judge constitutionally required. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). In a footnote in *Aetna*,[10] Chief Justice Burger pointed out that more is required than the slightest pecuniary interest in the outcome to raise due process issues. The footnote concludes with this statement:

> "We therefore follow *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L. Ed. 2d 267 (1972), and decline to read *Tumey* [*Tumey v. Ohio*, 273 U.S. 510 (1927)] as constitutionalizing any rule that a decision rendered by a judge with 'the slightest pecuniary interest' constitutes a violation of the Due Process Clause."

The petition now before this Court is premised on the mistaken conclusion that Special Chief Justice Cearley regularly acts as counsel for the Association and the Association will benefit from the court's decision. The only evidence that Justice Cearley is, or was, counsel for the Association is based upon the affidavit of a paid

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[9] See Petitioner's Appendix C, page 23a.

[10] 475 U.S. 813, 825-826.

summer employee of Hopkins & James, counsel for Petitioner. That affidavit is based on alleged conversations with unidentified employees of the Association. Based on that affidavit alone, Petitioner seeks to disqualify Special Chief Justice Cearley and the entire panel. The integrity of the justices of the Arkansas Supreme Court should not be impugned based on a hearsay affidavit of a summer law clerk.

In *Aetna*, this Court stated that recusal is constitutionally required only under limited circumstances.[11] Specifically, this Court observed:

> The Court has recognized that not '[a]ll questions of judicial qualification . . . involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.' (citations omitted)
>
> . . .
>
> We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required, and appellant's arguments here fall well below that level. . . . Appellant's allegations of bias and prejudice on this general basis, are insufficient to establish any constitutional violation.[12]

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[11] 475 U.S. 813, 820-822.

[12] *Id.*

The *Aetna* court then concluded that the Due Process Clause is only violated when the judge has a "direct, personal, substantial, pecuniary interest" in the case.[13] Here, Petitioner claims Justice Cearley was disqualified because of his relationship to the Association. The Association is not a party to this suit. It has nothing at stake in this litigation. Petitioner has not established that either Justice Cearley or the Association has a direct, substantial, pecuniary interest in the outcome.

At page 11 of his brief, Petitioner alleges "at all times relevant to the Arkansas appellate proceedings, Special Chief Justice Cearley served as counsel for the Association." There is no evidence of that. Based on his telephone conversation with some unidentified person, Carney stated "that Robert Cearley acted as adjunct counsel."[14] The affidavit was stated in the past tense and gave no time reference. Even assuming the statement is accurate, one can only conclude that at some point in the past, Justice Cearley may have acted as adjunct counsel to the Association. There is no evidence that he was then acting as adjunct counsel or would act in the future as adjunct counsel to the Association. Any possible benefit to him or the Association would be remote and based on speculation and conjecture.

Petitioner also claims the guaranty form in question was "routinely used by banks and other financial institutions."[15] There is no evidence to support that conclusion.

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[13] 475 U.S. 813, 822.

[14] See Petitioner's Appendix F, page 53a.

[15] Brief, page 11.

There was no evidence at the trial of this case that the guaranty form was used by any bank other than Respondent. Even if that allegation were true, it fails to establish a direct, substantial benefit to either Justice Cearley or the Association.

Petitioner also contends the opinion by Special Chief Justice Cearley contained interpretations of the guaranty agreement which will indirectly benefit all members of the Association.[16] Even a cursory reading of the opinion illustrates the fallacy of that conclusion. Petitioner's primary defense at trial, and on appeal, was that Respondent impaired the collateral securing the Bearhouse loan. The court disposed of that argument in one paragraph based on its prior case of *Myers v. First State Bank of Sherwood*, 293 Ark. 82, 732 S.W.2d 459 (1987) which held that impairment of collateral defense does not apply to one who executes a separate guaranty. Justice Cearley and the majority did not create new law which benefited Respondent or the Association. They simply followed prior precedents and the law established by *Ark. Stat. Ann.* § 85-3-606, now *Ark. Code Ann.* § 4-3-605.

In his petition to this Court, Petitioner contends that both Respondent and the Association benefited from the court's interpretation of the guaranty agreement itself. Respondent expects to benefit from the decision. The fact that Respondent may benefit from the decision is immaterial to the petition. There is no evidence that the Association will benefit from the decision. The Arkansas court simply relied on *Lindell Square Ltd. Partnership v. Savers*

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[16] Brief, page 11.

Fed. Sav. & Loan Ass'n, 27 Ark. App. 66, 76, 767 S.W.2d 41, 47 (1989) which held that a guarantor's liability is in addition to and independent of other security so that any recourse against collateral is in addition to the rights against the guarantor. The court's opinion neither created new law nor changed existing law.

Petitioner suggests at page 14 of his brief that "if the opinion is allowed to stand, all members of the Bankers Association will reap substantial benefits due to the Arkansas court's approval of the language in the guaranty in question in this suit and the opinion's favorable interpretation of Section 3-606 of the Arkansas Uniform Commercial Code." This statement is inaccurate because, as noted above, the court's decision did not change the law but simply followed the precedent of *Lindell Square Ltd. Partnership v. Savers Fed. Sav. & Loan Ass'n, supra,* and *Myers v. First State Bank of Sherwood, supra.*

In support of his contention that he was denied due process, Petitioner relies principally on *Aetna, supra,* and *Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847 (1988). Neither case is factually on point. In *Aetna,* this court vacated and remanded the judgment of the Supreme Court of Alabama where an Alabama justice had a *direct* interest in the outcome of the case. There, Justice Embry of the Alabama Supreme Court received $30,000.00 in settlement of a suit which was based on bad faith failure to pay a claim. That settlement came after he had authored an opinion dealing with the circumstances under which an insurance company may be liable for compensatory and punitive damages for bad faith failure to pay a claim. His personal case was pending before an Alabama trial court at the same time he wrote the opinion

of the Alabama Supreme Court. He had a *direct* interest in the outcome of the opinion he authored. This court concluded:

> "We hold simply that when Justice Embry made that judgment, he acted as *'a judge in his own case.'* (citations omitted) (emphasis supplied)
>
> . . .
>
> We also hold that his interest was 'direct, personal, substantial [and] pecuniary.' "[17] (citations omitted)

There is no evidence that Justice Cearley was ever involved in any case, either personally or as counsel, which involved the same issues as in this case. Justice Cearley did not act as "a judge in his own case." There is no evidence that he received a "direct, personal, substantial and pecuniary" benefit from the opinion he wrote.

The facts in *Liljeberg, supra,* are far different from the facts in the present case. In *Liljeberg,* the district judge was on the board of directors of an institution that had a material interest in the outcome of the litigation pending before the district court. This court held that the trial judge was required to recuse under 28 U.S.C. § 455(a), a statute that does not apply to state judges. Even if this Court assumes that Justice Cearley acts as adjunct counsel to the Association, there is no evidence to establish that either Justice Cearley or the Association had any material interest in the outcome of this litigation.

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[17] 475 U.S. 813, 824.

Petitioner has failed to establish that Justice Cearley had a material interest in, or received a substantial benefit from, the opinion. The petition should be denied. Otherwise, counsel will seek to vitiate the opinion of every appointed state court justice on some perceived conflict of interest.

Petitioner further requests the Court to vacate the opinion and disqualify the entire panel from sitting on this case. However, in *Aetna*, this Court did not disqualify the entire panel. There, in dismissing appellant's contention that the entire panel should be disqualified, this Court stated:

> Appellant has challenged not only the participation of Justice Embry in this case but also the participation of all the other justices of the Alabama Supreme Court . . . claiming that they also have an interest in this case. Such allegations do not constitute a sufficient basis for requiring recusal under the Constitution.
>
> . . .
>
> More important, while these justices might conceivably have had a slight pecuniary interest, [] we find it impossible to characterize that interest as 'direct, personal, substantial, [and] pecuniary.'[18] (citations omitted)

Petitioner does not allege any compelling constitutional basis for disqualifying all members of the Arkansas Supreme Court. There is no evidence that those justices had a direct, substantial and pecuniary interest in the

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[18] 425 U.S. 813, 825.

outcome of this case. The suggestion that they are disqualified to serve lacks any constitutional merit.

2. Justice Cearley's Vote Was Not Crucial To The Decision.

The Arkansas justices voted 5 to 2 to reverse and remand this case. Justice Cearley voted with the majority. However, if Justice Cearley had not participated in the case, the case would have been reversed based on a 4 to 2 vote. This court emphasized in *Aetna*[19] that Justice Embry cast the deciding vote and authored the opinion. Here, although he did author the opinion, Justice Cearley did not cast the deciding vote. The court should not vacate the opinion because Justice Cearley's vote was not crucial to the outcome.

3. Petitioner Failed To Timely Request Recusal.

This case was docketed in the Arkansas Supreme Court on March 19, 1991. Governor Clinton appointed the three special justices in the fall of 1991. The case was argued orally on April 13, 1992. The case was decided on June 29, 1992. Petitioner filed his first motion for recusal on August 24, 1992. Rule 27, *Arkansas Rules of Supreme Court*, provides:

> Whenever it is desired to suggest the disqualification of a judge of this court in a case to be submitted, the attorney so desiring shall present

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[19] 425 U.S. 813, 822-823.

> the matter to the court in consultation ***a reasonable time before the day of submission of the case***. (emphasis supplied)

Petitioner did not request recusal within a reasonable time before the case was submitted. Likewise, Petitioner did not explain why he waited until after the decision to conduct his investigation.

Petitioner states at page 10 of his brief that after a "brief" investigation, he filed his motion to suggest disqualification and to vacate opinion. Petitioner gives no reason for waiting over eight months after Special Chief Justice Cearley was appointed to conduct his "brief but necessary investigation." The letter from Governor Clinton to Special Chief Justice Cearley reflects that Cearley is a practicing attorney in Little Rock, as is counsel for Petitioner. The trial transcript establishes that Petitioner is a banker and practicing attorney with 28 years experience. In spite of these facts, absolutely no reason is given for waiting until after the case was decided to conduct the investigation.

Petitioner failed to timely seek recusal.

CONCLUSION

A judge is not constitutionally disqualified from serving if the judge's interest in the case is only slight or remote. To be constitutionally suspect, the interest must be "direct, personal, substantial [and] pecuniary."[20] The

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[20] 475 U.S. 813, 822.

facts in this case fall far short of that. The petition should be denied.

Respectfully submitted,

THOMAS S. STREETMAN
Counsel of Record
ARNOLD, HAMILTON & STREETMAN
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Crossett, Arkansas 71635
Telephone: (501) 364-2213
Counsel for Respondent,
First National Bank Of
Crossett

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APPENDIX A

(SEAL)

STATE OF ARKANSAS
OFFICE OF THE GOVERNOR
State Capitol
Little Rock 72201

Bill Clinton
Governor

(Filed OCT 10, 1991)

October 4, 1991

William S. Miller
1400 Union Bank Building
Little Rock, AR 72201

RE: 91-65. First National Bank of Crossett v. Richard E. Griffin.

Dear William:

Associate Justice Robert Brown has disqualified himself in the above-styled matter. As a result, I am privileged to appoint you Associate Justice to hear and participate in the decision of this specific case.

I am enclosing herewith your commission and a duplicate oath form. The oath must be executed and returned within fifteen (15) days after issuance to the Secretary of State's Office, State Capitol Building, Little Rock, Arkansas 72201.

Thank you very much for your willingness to serve in this capacity.

Sincerely,

/s/ Bill Clinton
Bill Clinton

BC:pg

Enclosures

cc: The Honorable Jack Holt, Jr.,
Chief Justice
The Honorable Don Corbin,
Associate Justice
The Honorable Steele Hays,
Associate Justice
The Honorable David Newbern,
Associate Justice
The Honorable Tom Glaze,
Associate Justice
The Honorable Bob Brown,
Associate Justice
The Honorable Robert Dudley, Associate Justice
Les Steen, Clerk

APPENDIX B

(SEAL)

STATE OF ARKANSAS
OFFICE OF THE GOVERNOR
State Capitol
Little Rock 72201

Bill Clinton
Governor

(Filed OCT 10, 1991)

October 4, 1991

Jerry D. Pinson
P.O. Box 1111
Harrison, AR 72601

Re: 91-65. First National Bank of Crossett v. Richard E. Griffin.

Dear Jerry:

Associate Justice Robert Dudley has disqualified himself in the above-styled matter. As a result, I am privileged to appoint you Associate Justice to hear and participate in the decision of this specific case.

I am enclosing herewith your commission and a duplicate oath form. The oath must be executed and returned within fifteen (15) days after issuance to the Secretary of State's Office, State Capitol Building, Little Rock, Arkansas 72201.

Thank you very much for your willingness to serve in this capacity.

Sincerely,

/s/ Bill Clinton
Bill Clinton

BC:pg

Enclosures

cc: The Honorable Jack Holt, Jr.,
Chief Justice
The Honorable Don Corbin,
Associate Justice
The Honorable Steele Hays,
Associate Justice
The Honorable David Newbern,
Associate Justice
The Honorable Tom Glaze,
Associate Justice
The Honorable Bob Brown,
Associate Justice
The Honorable Robert Dudley,
Associate Justice
Les Steen, Clerk

APPENDIX C

(SEAL)

STATE OF ARKANSAS
OFFICE OF THE GOVERNOR
State Capitol
Little Rock 72201

Bill Clinton
Governor

(Filed DEC 18, 1991)

December 16, 1991

Robert Cearley
221 W. 2nd Street
Little Rock, AR 72201

Re: 91-65. First National Bank of Crossett v. Richard E. Griffin.

Dear Bob:

Chief Justice Jack Holt, Jr., has disqualified himself in the above-styled matter. As a result, I am privileged to appoint you Special Chief Justice to hear and participate in the decision of this specific case.

I am enclosing herewith your commission and a duplicate oath form. The oath must be executed and returned within fifteen (15) days after issuance to the Secretary of State's Office, State Capitol Building, Little Rock, Arkansas 72201.

Thank you very much for your willingness to serve in this capacity.

Sincerely,

/s/ Bill Clinton
Bill Clinton

BC:pg

Enclosures

cc: The Honorable Jack Holt, Jr.,
Chief Justice
The Honorable Don Corbin,
Associate Justice
The Honorable Steele Hays,
Associate Justice
The Honorable David Newbern,
Associate Justice
The Honorable Tom Glaze,
Associate Justice
The Honorable Bob Brown,
Associate Justice
The Honorable Robert Dudley,
Associate Justice
Les Steen, Clerk

APPENDIX D

IN THE SUPREME COURT OF ARKANSAS

FIRST NATIONAL BANK OF CROSSETT, APPELLANT

VS. NO. 91-65

RICHARD E. GRIFFIN APPELLEE

RESPONSE TO MOTION TO DISQUALIFY AND VACATE OPINION

(Filed AUG 31, 1992)

For its response to appellee's Motion to Suggest Disqualification and to Vacate Opinion, appellant states:

1. The motion to disqualify should be denied because it was not timely filed. Rule 27, *Rules of Supreme Court*. Griffin has moved that not only Special Chief Justice Robert M. Cearley, Jr. be disqualified, but also that all other members of the court should consider recusing. That motion is not timely under Rule 27. This case was fully briefed and ready for submission to this court on July 10, 1991. The three special justices were appointed in December, 1991, but Griffin did not file his motion to disqualify until August 19, 1992, which was more than eight months after the special justices were appointed, more than four months after the oral argument and six weeks after the opinion was delivered in this case. Griffin, a long time practicing attorney and Chairman of the Board of First State Bank of Crossett, gave no explanation why he waited eight months to file the motion to disqualify. That was more than sufficient time for Griffin and his Little Rock counsel to investigate the background of every member of the court panel. Instead, he conveniently waited until this case was decided so he would

have the opportunity for "two bites at the apple." If the court permits tactics of this nature to prevail, there will be no end to litigation and it will give losing litigants an unfair advantage. It is obvious that Griffin had no interest in requesting Special Chief Justice Cearley, nor any other member of this court, to disqualify until after he had lost this case.

2. The motion to disqualify Special Chief Justice Cearley should be denied because it is based on the rankest of hearsay by a biased person. The motion is based on the affidavit of an employee of Gregory Hopkins, Griffin's attorney. The affidavit is based upon hearsay statements by an unidentified, alleged employee of Arkansas Bankers Association. If an affidavit by a paid employee of counsel of record which is not based on his own personal knowledge but rather on hearsay statements from unidentified sources is sufficient to disqualify a justice and vacate the court's opinion, this court will open Pandora's box to all manner of post-opinion motions by disgruntled litigants.

3. The court should deny the motion to disqualify Special Chief Justice Cearley because, even assuming the allegations in the affidavit are true, the Arkansas Bankers Association is not and has never been a party to this litigation. Likewise, there is not a shred of evidence to establish that the guaranty form in question was prepared by the Arkansas Bankers Association. There is absolutely no evidence to establish that the guaranty form in question was used by a member bank of the Arkansas Bankers Association other than appellant. There is not any evidence that the Arkansas Bankers Association even prepares bank forms.

4. The motion to disqualify should be denied because Griffin's allegation that the Arkansas Bankers Association would be benefited by the court's decision is inaccurate. The obligation of a guarantor under Arkansas law was laid to rest in *Lindell Square, Ltd. Partnership v. Savers Fed. Sav. & Loan Ass'n*, 27 Ark. App. 66, 766 S.W.2d 41 (1989) where the court held that a guarantor's obligation is fixed when debtor defaults. Likewise, this court earlier held in *Moore v. Luxor* (No. Am. Corp.), 294 Ark. 326, 742 S.W.2d 916 (1988) that the holder of a promissory note had no duty to accept an offer of collateral or to repossess the collateral for the protection of a guarantor. Therefore, the court's decision in the present case is neither revolutionary nor startling new precedent in this field.

5. The motion to disqualify Special Chief Justice Cearley should be denied because there is absolutely no showing that Justice Cearley will benefit either directly or indirectly from this decision. Griffin relies upon three cases, *Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847 (1988), *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1985) and *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415 (1988). In all three cases, a sitting justice had a direct relationship with one of the litigants or would personally benefit from the decision of the court because of a pending case where the justice was a litigant. Here, Special Chief Justice Cearley has absolutely no relationship with First National Bank of Crossett, and Griffin has not even suggested that Justice Cearley would personally benefit from this decision. This is nothing more than a bush league tactic to have this case reheard by a different

panel or delay entry of judgment against him on a suit filed in 1987.

6. The motion to disqualify Special Chief Justice Cearley should be denied because the crux of this decision is not based upon use of an "Arkansas Bankers Association form," but rather involves the application of the parol evidence rule to a written guaranty agreement that Griffin himself characterized as "clear and unambiguous and speaks for itself."

7. The motion to disqualify other members of this court without suggesting a valid reason is an affront to this court and reflects a desperate attempt by Griffin to avoid the ultimate judgment against him.

8. The motion to vacate the opinion should be denied because even without Special Chief Justice Cearley's concurrence, the majority of the court has voted to reverse and remand this case to the trial court. Although Griffin relies upon *Johnson v. Sturdivant, supra,* and *Liljeberg v. Health Services Acquisition Corporation, supra,* neither case is in point because in both cases, a sitting justice could have personally benefited from the decision because he was personally involved in litigation with similar legal issues. That is not the case here. Griffin, who has not acted timely, should not be given the unfair advantage of "two bites at the apple."

For the reasons stated above, the motion to disqualify and the motion to vacate should be denied.

Respectfully submitted,

FIRST NATIONAL BANK
OF CROSSETT, ARKANSAS

BY: ARNOLD, HAMILTON
& STREETMAN
Its Attorneys
Post Office Drawer A
Crossett, Arkansas 71635
501/364-2213

PER: /s/ Thomas S. Streetman
THOMAS S. STREETMAN
Arkansas Bar No. 61030

CERTIFICATE OF SERVICE

Thomas S. Streetman, attorney for Appellant, certifies that a copy of the foregoing Response to Motion to Disqualify and Motion to Vacate has been served on Appellee by mailing a copy of same, postage prepaid, to his attorney of record, Mr. Gregory M. Hopkins, 1910 1st Commercial Building, Little Rock, Arkansas 72201, on this 28th day of August, 1992.

/s/ Thomas S. Streetman
THOMAS S. STREETMAN